STATEMENT OF
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HEARING OF THE
SUBCOMMITTEE ON ADMINISTRATIVE LAW AND
GOVERNMENTAL RELATIONS
OF THE HOUSE JUDICIARY COMMITTEE

on

H.R. 595: SUBSTITUTING THE UNITED STATES
AS DEFENDANT
IN CONSTITUTIONAL TORT SUITS

April 28, 1983

Good morning, Mr. Chairman and members of the Subcommittee. My name is Thomas J. Madden. I am a partner in the law firm of Kaye, Scholer, Fierman, Hays & Handler. With me are my associates David H. Remes and Nicholas W. Allard.

My Chairman, let me begin by thanking the Subcommittee for inviting me to testify this morning on the important legislation before you, H.R. 595. My interest in the matter is not academic. Before joining Kaye, Scholer, I served for eight years in the Department of Justice as General Counsel of the Law Enforcement Assistance Administration, and had the opportunity to observe at first hand the problems that have bedevilled plaintiffs and defendants alike in Bivens-type actions. I have also given the matter close study in preparing an extensive report on sovereign immunity and official liability for the Administrative Conference of the United States, which I and my associates completed last fall. I have made a copy of that report available to Subcommittee staff, and, with your permission, Mr. Chairman, would request that Chapter IV of that report, dealing specifically with legislative efforts to replace the Bivens remedy, be inserted in the record.

Finally, with my associates, I have written an article addressing H.R. 595 and its companion Senate bills for the Harvard Journal on Legislation, entitled "Bedtime for Bivens: Substituting the United States as Defendant in Constitutional Tort Suits." With your permission, Mr. Chairman, I would ask that the galleys of this article be inserted in the record.

Mr. Chairman, I think we are all agreed by this time that the Bivens remedy is not satisfactorily serving the purposes it was fashioned by the Supreme Court 12 years ago to promote. It is widely recognized that remitting those who have suffered constitutional injuries to suits against individual officials does not afford the victims of official misconduct a financially responsible defendant. It is also widely perceived that the very risk of being sued in a Bivens-type action discourages federal employees from vigorously discharging their official responsibilities. Largely for these reasons, most people agree that the broad purposes of the Bivens remedy -- assuring adequate compensation of the victim, measured deterrence of official wrongdoing, and fairness in the administration of justice -- would better be served if the United States were substituted as defendant in constitutional tort suits arising out of the allegedly unconstitutional conduct of federal employees.

As the members of this Subcommittee are well aware, however, efforts to replace the Bivens remedy with a statutory action against the United States raise a host of subsidiary issues, and around these issues much disagreement persists. Disagreement is perhaps sharpest over these two issues: First, should the United States, in defending itself in a constitutional tort suit, be permitted to argue that the employee whose conduct gave rise to the suit acted "reasonably"? And, second, is it appropriate to discard the Bivens remedy without

establishing some substitute administrative mechanism for assuring that the employee whose conduct gave rise to the suit will be held accountable for his conduct? It is to these two issues that I wish to address myself briefly this morning. A more extended treatment may be found in the materials submitted with this testimony.

First, on the issue of whether the United States should be permitted to assert the "reasonableness" of an employee's conduct, I would make four observations:

1. Nothing in established tort doctrine applicable to every analogous situation of vicarious liability supports the proposition that the United States should be permitted to invoke the qualified or "good faith" immunity of its employees in constitutional tort suits. I have set out our research on this issue in detail in a letter to the Chairman dated February 3, 1983, and the Deputy Attorney General, in his letter to the Chairman dated April 11, 1983, has confirmed that our research on this issue is accurate. With your permission, Mr. Chairman, I would ask that this correspondence be inserted in the record.

2. Nothing in the policy underlying the qualified or "good faith" immunity justifies making it available to the United States in constitutional tort suits. Vicarious immunity is not the flip-side of vicarious liability. The policy justification for affording individual

federal officials qualified or "good faith" immunity disappears when the federal government is made liable instead, as the Supreme Court has recognized in the § 1983 context in Owen v. City of Independence. Moreover, as Judge Posner noted in a § 1983 decision handed down earlier this month, "holding the [government] liable creates incentives to avoid illegal behavior without at the same time overdeterring individuals by the threat of crushing personal liability." Reed v. Village of Shorewood, slip op. 14 (7th Cir. Apr. 5, 1983) (No. 82-2190). That is one of the principal reasons why the Supreme Court in Owen held that a municipality may be held liable for actions in circumstances where their employees would have been immune.

3. Allowing the United States to assert the qualified or "good faith" immunity of its employees would, paradoxically, cancel out two of the main benefits of replacing the Bivens remedy with a statutory action against the United States.

First, federal officials would remain enmeshed in protracted litigation over the "reasonableness" of their conduct, and over a myriad of state-of-mind issues. As we have pointed out in our Harvard Journal on Legislation article and elsewhere, this prophesy has already been borne out by a slew of post-Harlow cases. Recognizing this fact, the Administration argues that it is actually

a good thing to give employees whose actions give rise to constitutional tort suits a chance to "clear their names," but this strikes me as inviting the very problem that replacing Bivens is meant to avoid.

The second consequence of allowing the United States to invoke the qualified or "good faith" immunity of its employees will be to discourage many litigants with meritorious claims from suing the United States. The risk that an employee's actions will be found to have satisfied the Supreme Court's test of "objective reasonableness" under Harlow may well make litigation of underlying claims of constitutional injury a gamble not worth taking. This result may be justifiable when any other rule would serve to chill individual federal employees from vigorously discharging their official responsibilities, but has no justification when the United States, rather than the federal employee individually, is liable.

4. Allowing the United States to assert the "reasonableness" of an employee's conduct as a defense in constitutional tort suits would, finally, have the unfortunate effect of reducing constitutional injuries to the status of negligent torts. As we explained in our letter of April 20, 1983 -- a copy of which, Mr. Chairman, with your permission I would ask to be inserted in the record -- an employer, in the negligence context, is traditionally allowed to assert the reasonableness of an employee's

conduct for one very simple reason: If the employee has acted reasonably, there is no negligence, and no tort has occurred. If, on the other hand, a federal employee violates someone's constitutional rights, a legally cognizable wrong has occurred, and the "reasonableness" of the federal employee's conduct is immaterial. The Constitution itself defines what is "reasonable," and any departure from that standard is, by definition, unreasonable.

For these reasons, Mr. Chairman, I believe it would be a grave mistake for Congress to permit the United States to assert the "reasonableness" of an employee's conduct in a constitutional tort suit.

On the second major issue raised by the pending legislation -- namely, the availability of substitute administrative deterrence mechanisms -- let me say just a few words. The Supreme Court in Carlson v. Green, its most recent Bivens decision, has stressed "the doubt . . . cast on the assumption that there exist adequate mechanisms for disciplining federal employees" who violate constitutional rights. It would not be satisfactory, I think, to rely for discipline exclusively on the agency that employs the official whose conduct gave rise to a constitutional tort suit; such an agency would often either be tempted not to hold the official to account, because doing so would be embarrassing to the agency, or, worse still, be tempted to make the official a scapegoat for the misdeeds

of his superiors, or their policies. For these reasons, it seems a modest enough proposal to suggest that the existing mechanisms of accountability be supplemented with independent administrative procedures, to be used if the agency that employs the official whose conduct is in question does not adequately respond to a determination of constitutional injury by the courts in a statutory action against the United States.

Mr. Chairman, that concludes my testimony. I will be glad to try to answer any questions you may have.